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13 UNITED STATES DISTRICT COURT  
14 FOR THE EASTERN DISTRICT OF CALIFORNIA  
15

16 UNITED STATES OF AMERICA

17 Plaintiffs,

18 v.

19 MODESTO ENERGY LIMITED PARTNERSHIP,  
20 MODESTO ENVIRONMENTAL CORP.,  
ENPOWER MANAGEMENT CORP., and  
21 CMS GENERATION CO.

22 Defendants.  
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CIVIL NO.

COMPLAINT

## I. COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through its undersigned attorneys, acting at the request of the United States Coast Guard files this Complaint against the operators of a waste tire storage and tires-to-energy facility (Tire Pile Facility) located in Westley, California and alleges as follows:

## II. JURISDICTION AND VENUE

1. The United States brings this civil action against Defendants to recover, on behalf of itself and the Oil Spill Liability Trust Fund (Spill Fund), all unreimbursed costs including interest, prejudgment interest, administrative and adjudicative costs, and attorneys' fees, totaling \$3,896,873.45 for the oil spill cleanup of the Westley Tire Pile Facility.

2. The United States brings this action under: 1) the Oil Pollution Act of 1990 ("OPA"), Section 1001, 33 U.S.C. §2701 et. seq.; 2) the Federal Water Pollution Control Act ("FWPCA") Section 101, 33 U.S.C. §1251 et. seq.; and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), Section 101, 42 U.S.C. § 9601 et. seq.

3. This Court has jurisdiction over the subject matter of, and the parties to this action pursuant to OPA Section 1017(b), 33 U.S.C. § 2717(b); FWPCA Section 309(b), 33 U.S.C. § 1319(b); and under CERCLA Section 107, 42 U.S.C. § 9607 and Section 113(b), 42 U.S.C. § 9613(b).

4. Venue is proper in this judicial district pursuant to OPA Section 1017(b), 33 U.S.C. § 2717(b), because: (1) the discharge and/or substantial threat of a discharge of oil occurred at a facility in this district; (2) the Defendants do business in, and reside in this district. Venue is also proper in this district under FWPCA Section 309(b), 33 U.S.C. §1319(b), because the Defendants reside in and are doing business in this district. Venue is also proper in this judicial district pursuant to CERCLA Section 113, 42 U.S.C. §9613(b), because: (1) the release and damages occurred in this district, and (2) the Defendants do business in this district.

## III. PARTIES

5. Plaintiff is the United States of America, on behalf of the United States Coast Guard ("Coast Guard").

1           6.       Defendants Modesto Energy Limited Partnership ("MELP"), Modesto  
2 Environmental Corp. ("MEC") and Enpower Management Corp. ("EMC") (collectively  
3 "MELP") have been continuous operators of one parcel of the Tire Pile Facility from 1984 until  
4 the present.

5           7.       From December of 1987 until July of 1995 Defendant CMS Generation Company  
6 ("CMS") and/or its subsidiaries Oxford Energy, Oxford Tire Recycling of California, Oxford  
7 Tire Recycling of Modesto, and Oxford Tire Recycling of Northern California also operated a  
8 parcel of the Tire Pile Facility.

#### 9                               IV. GENERAL ALLEGATIONS

10           8.       The Tire Pile Facility is located on an approximately 40-acre parcel of land that  
11 includes a canyon with drainage that flows into an unnamed intermittent spring. The spring  
12 flows under Interstate 5, across a field, to the California Aqueduct. The California Aqueduct  
13 flows from the San Francisco Bay to Los Angeles.

14           9.       On September 22, 1999, the Tire Pile Facility located at 4549 Ingram Creek Road,  
15 Westley, California, was struck by lightning. The lightning strike ignited the tire pile, which  
16 caused the release of pyrolytic oil and numerous hazardous substances from the tires.

17           10.       At the time of the fire, the Tire Pile Facility contained approximately 7 million  
18 stockpiled scrap tires.

19           11.       The tires were stored to be used as part of a "tires-to-energy" program.

20           12.       The tires burned for 34 days, releasing carcinogenic toxins including polynuclear  
21 aromatic hydrocarbons, benzene, carbon monoxide, and nitrogen oxides into the atmosphere, and  
22 generated at least 250,000 gallons of pyrolytic oil.

23           13.       The pyrolytic oil posed a substantial threat of discharge into the navigable waters  
24 of the California Aqueduct and/or the environment.

25           14.       The U.S. Coast Guard and the U.S. Environmental Protection Agency responded  
26 to the release of oil and conducted a removal action. The response included containing the oil  
27 runoff and collecting it for removal from the Site.

          15.       The constituents of the tires included CERCLA hazardous substances that were

1 released into the environment by the fire.

2 16. Analytical samples gathered during the fire showed the presence of various  
3 CERCLA hazardous substances, including benzene, ethylbenzene, naphthalene, styrene, toluene,  
4 1,3,5-trimethylbenzene, xylenes, phanthrene, 2, 4-dimethylphenol, methylphenol and phenol.

5 17. The costs incurred by the United States in responding to the release or threatened  
6 release of hazardous substances at the Tire Pile Facility totaled \$3,430,564.74, exclusive of  
7 interest.

8 18. MELP, MEC, and EMC, are each "owners or operators" of the Tire Pile Facility,  
9 within the meaning of OPA Section 1001(26), 33 U.S.C. § 2701(26), FWPCA Section 311(a)(6),  
10 33 U.S.C. § 1321(a)(6), and are "owners" and "operators" of the Tire Pile Facility within the  
11 meaning of CERCLA Sections 101(20)(A) and 107(a)(1), 42 U.S.C. §§ 9601(20)(A) and  
12 9607(a)(1).

13 19. MELP, MEC, and EMC, are each a "person" within the meaning of OPA Section  
14 1001(27), 33 U.S.C. § 2701(27), FWPCA Section 311(a)(7), 33 U.S.C. § 1321(a)(7), and  
15 CERCLA Sections 101(21) and 107, 42 U.S.C. §§ 9601(21) and 9607.

16 20. CMS is a "person" within the meaning of CERCLA Sections 101(21) and 107, 42  
17 U.S.C. §§ 9601(21) and 9607.

18 21. CMS was an "owner or operator" of the Tire Pile Facility, at a time in which  
19 hazardous substances were disposed of within the meaning of CERCLA Sections 101(20)(A)  
20 and 107(a)(2), 42 U.S.C. §§ 9601(20)(A) and 9607(a)(2).

21 22. On August 12, 2002, the United States presented a claim to MELP and to CMS  
22 for the initial costs incurred in conducting the tire fire clean-up. The United States subsequently  
23 presented Defendants with a claim for additional costs incurred during the cleanup.

24 23. MELP and CMS have failed to pay any of the costs demanded by the United  
25 States.

## 26 V. STATUTORY BACKGROUND

### 27 A. FEDERAL WATER POLLUTION CONTROL ACT

24. The objective of the FWPCA is to restore and maintain the chemical, physical,

1 and biological integrity of the waters of the United States. Section 101(a), 33 U.S.C. § 1251(a).

2 25. FWPCA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), prohibits: "The discharge of  
3 oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining  
4 shorelines . . . in such quantities as may be harmful as determined by the President under  
5 paragraph (4) of this subsection . . ."

6 26. For purposes of FWPCA Section 311, 40 C.F.R. § 110.1 provides, as to the term  
7 "navigable waters:"

8 "Navigable waters" means the waters of the United States, including the territorial  
9 seas. . ."

10 27. FWPCA Section 311(c)(1)(A), 33 U.S.C. § 1321(c)(1)(A), requires the President,  
11 consistent with the National Contingency Plan, 40 C.F.R. Part 300, to "ensure effective and  
12 immediate removal of a discharge, and mitigation or prevention of a substantial threat of a  
13 discharge, of oil or a hazardous substance - - (i) into or on the navigable waters; (ii) on the  
14 adjoining shoreline to the navigable waters . . ."

15 28. FWPCA Section 311(c)(1)(B), 33 U.S.C. § 1321(c)(1)(B), authorizes the  
16 President to: "(i) remove or arrange for the removal of the discharge, or mitigate or prevent the  
17 substantial threat of the discharge; and (ii) remove...by whatever means are available."

18 29. The President's authority under FWPCA Section 311 has been delegated to the  
19 Administrator of the Environmental Protection Agency, and to the head of each other federal  
20 department and agency having responsibilities under the National Contingency Plan. See  
21 Executive Order No. 11735, 38 Fed. Reg. 21243 (August 7, 1973).

22 30. FWPCA Section 311(f)(2) provides:

23 Except where an owner or operator of an on-shore facility can prove that a  
24 discharge was caused solely by (A) an act of God, (B) an act of war, (C)  
25 negligence on the part of the United States Government, or (D) an act or omission  
26 of a third party without regard to whether any such act or omission was or was not  
27 negligent, or any combination of the foregoing clauses, such owner or operator of  
any such facility from which oil or a hazardous substance is discharged in  
violation of subsection (b)(3) of this section shall be liable to the United States  
Government for the actual costs incurred under subsection (c) of this section for  
the removal of such oil or substance by the United States Government in an  
amount not to exceed \$50,000,000 . . .

1 31. FWPCA Section 311(a), 33 U.S.C. § 1321(a), provides: "'discharge' includes,  
2 but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping...."

3 32. FWPCA Section 311(a), 33 U.S.C. § 1321(a), provides: "'oil' means oil of any  
4 kind or in any form, including but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil  
5 mixed with wastes other than dredged spoil."

6 33. FWPCA Section 311, 33 U.S.C. § 1321(a), provides: "'person' includes any  
7 individual, firm, corporation, association, and a partnership."

8 34. Pursuant to FWPCA Section 311(b)(4), the Administrator of the Environmental  
9 Protection Agency has determined by regulation, set forth at 40 C.F.R. § 110.3, that: "discharges  
10 of oil...that may be harmful to the public health or welfare or the environment of the United  
11 States include discharges of oil that:

12 (a) Violate applicable water quality standards; or

13 (b) Cause a film or sheen upon or discoloration of the surface of the water or  
14 adjoining shorelines or cause a sludge or emulsion to be deposited beneath the  
15 surface of the water or upon adjoining shorelines."

16 B. OIL POLLUTION ACT

17 35. The principal purposes of the OPA include establishing a fund to pay for the costs  
18 of removal of oil in the event of a discharge or a substantial threat of a discharge of oil and to  
19 compensate any party suffering damages from actual or threatened discharges of oil or hazardous  
20 substances. S. Rep. No. 94, 101st Cong., 1st Sess. (1989). Congress designed OPA to provide  
21 protection for the environment and to aid the victims of oil spills. Id.

22 36. OPA Section 1002, 33 U.S.C. § 2702, provides:

23 (a) Notwithstanding any other provision or rule of law . . . each responsible party  
24 for a vessel or a facility from which oil is discharged, or which poses the  
25 substantial threat of a discharge of oil, into or upon the navigable waters or  
26 adjoining shore lines . . . is liable for the removal costs . . . (b) that result from  
27 such incident.

(b) (1) The removal costs referred to in subsection (a) of this section are- -

(A) All removal costs incurred by the United States, a State, . . . under subsection  
(c), (d), (e), or (f) of section 1321 of this title . . . .

37. OPA Section 1001(7), 33 U.S.C. § 2701(7), provides: "'discharge' means any  
emission (other than natural seepage), intentional or unintentional, and includes, but is not

1 limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping.”

2 38. OPA Section 1001(21), 33 U.S.C. § 2701(21), provides: “‘navigable waters’  
3 means the waters of the United States, including the territorial sea.”

4 39. OPA Section 1001 (23), 33 U.S.C. § 2701(23), provides:

5 “oil” means oil of any kind or in any form, including petroleum, fuel oil, sludge,  
6 oil refuse, and oil mixed with wastes other than dredged spoil, but does not  
7 include any substance which is specifically listed or designated as a hazardous  
8 substance under subparagraphs (A) through (F) of section 101(14) of the  
9 Comprehensive Environmental Response, Compensation, and Liability Act (42  
10 U.S.C. 9601) and which is subject to the provisions of that Act.

11 40. OPA Section 1001(30), 33 U.S.C. § 2701(30), provides:

12 ‘remove’ or ‘removal’ means containment and removal of oil or a hazardous  
13 substance from water and shorelines or the taking of other actions as may be  
14 necessary to minimize or mitigate damage to the public health or welfare,  
15 including, but not limited to, fish, shellfish, wildlife, and public and private  
16 property, shorelines, and beaches.

17 41. OPA Section 1001(31), 33 U.S.C. § 2701(31), provides: “‘removal costs’ means  
18 the costs of removal that are incurred after a discharge of oil has occurred or, in any case in  
19 which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate  
20 oil pollution from such an incident.”

21 42. OPA Section 1001(32)(B), 33 U.S.C. § 2701(32)(B), provides: “‘responsible  
22 party’ means . . . (B) In the case of an onshore facility . . . any person owning or operating the  
23 facility.”

24 43. Federal removal actions under OPA are financed through the Spill Fund, which  
25 was created by Congress in 1990 with the enactment of OPA. See 26 U.S.C. §§ 4611 and 9509.  
26 The Spill Fund is financed by taxes on petroleum, and reimbursement and civil penalties from  
27 responsible parties. Pursuant to OPA Section 1012(a), 33 U.S.C. § 2712(a), the Spill Fund can  
be used, inter alia, for the payment of federal and state removal costs; costs of federal, state and  
Indian natural resource damage trustees; certain non-governmental claims against the Spill Fund;  
and certain federal administrative, operational and personnel costs and expenses under OPA.  
The Spill Fund is administered by the U.S. Coast Guard, National Pollution Funds Center.

28 C. CERCLA

29 44. CERCLA provides in Section 107(a), 42 U.S.C. § 9607(a) that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section - -

(1) the owner and operator of a vessel or a facility...

\* \* \* \*

(4)... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan.

\* \* \* \*

45. The term "hazardous substances" is defined in CERCLA Section 101(14), 42 U.S.C. § 9601(14). Hazardous substances consist of listed and unlisted hazardous substances. See 40 C.F.R. § 302.4(a), (b). The listed CERCLA hazardous substances are identified in the Table set forth in 40 C.F.R. § 302.4.

46. Polynuclear aromatic hydrocarbons, nitrogen oxide, and benzene, are listed as CERCLA hazardous substances. See 40 C.F.R. § 302.4 (Table).

47. CERCLA Section 101(9), 42 U.S.C. § 9601(9), provides:

'facility' means (A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located . . . .

48. CERCLA Section 101(20)(A) provides: "'owner or operator' means . . . (ii) in the case of an onshore facility . . . any person owning or operating such facility . . . ."

49. CERCLA Section 101(18) provides: "'onshore facility' means any facility . . . of any kind located in, on, or under, any land or nonnavigable waters within the United States."

50. CERCLA Section 101(22), 42 U.S.C. § 9601(22) provides: "'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."

51. CERCLA Section 101(23), 42 U.S.C. § 9601(23) provides:

"remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release . . . .



VI. CLAIMS FOR RELIEF AGAINST MELP

A. FIRST CLAIM FOR RELIEF (Recovery of Removal Costs Under OPA)

52. The allegations set forth in paragraphs 1 through 50 are realleged and incorporated herein by reference.

53. The pyrolytic oil discharged by the fire at the Tire Pile facility was "oil" within the meaning of OPA Section 1001(23), 33 U.S.C. § 2701(23).

54. The Tire Pile Facility was a "facility" within the meaning of OPA Sections 1001(9) and 1002, 33 U.S.C. §§ 2701(9) and 2702.

55. The pyrolytic oil posed a substantial threat of a "discharge" of oil into or upon the California Aqueduct and adjoining shorelines within the meaning of OPA Sections 1001(7) and 1002, 33 U.S.C. §§ 2701(7) and 2702.

56. The California Aqueduct is a navigable water under OPA Section 1001(21) 33, U.S.C. § 2701 (21).

57. MELP is strictly, jointly, and severally liable pursuant to OPA Sections 1002(a) and (b)(1), 33 U.S.C. § 2702(a) and (b)(1), to reimburse the United States for the unreimbursed removal costs incurred by the U.S. EPA, as the result of the discharges and substantial threat of discharge of oil from the facility.

B. SECOND CLAIM FOR RELIEF (Recovery of Removal Costs Under FWPCA Section 311)

58. The allegations set forth in paragraphs 1 through 50 are realleged and incorporated herein by reference.

59. "Oil" was "discharged" from the facility within the meaning of FWPCA Section FWPCA Section 311(a)(1), 33 U.S.C. § 1321(a)(1).

60. The oil discharged from the facility flowed into a tributary to the California Aqueduct. As such, the discharge of oil from the facility constitutes a violation of FWPCA Section 311(b)(3), 33 U.S.C. § 1321(b)(3). See 40 C.F.R. § 110.3.

61. The Tire Pile Facility was an "onshore facility" within the meaning of FWPCA Section 311(a)(10), 33 U.S.C. § 1321(a)(10).

1           62. In accordance with FWPCA Section 311(f)(2), 33 U.S.C. § 1321(f)(2), MELP is  
2 strictly, jointly, and severally liable for the full amount of the costs incurred by the United States  
3 in conducting the removal of oil or a hazardous substance that was discharged from the facility  
4 into navigable waters.

5           C. THIRD CLAIM FOR RELIEF (Recovery of Response Costs Under CERCLA)

6           63. Paragraphs 1 to 50 are realleged and incorporated herein by reference.

7           64. The Tire Pile Facility is a "facility" within the meaning of CERCLA Section  
8 101(9), 42 U.S.C. § 9601(9).

9           65. There have been "releases" and "threatened releases" of "hazardous substances" at  
10 and from the Defendants' facility within the meaning of CERCLA Section 101(14), (22), 42  
11 U.S.C. § 9601(14), (22).

12           66. The costs incurred by the United States in responding to the release and  
13 threatened release of hazardous substances from the Tire Pile Facility are not inconsistent with  
14 the National Contingency Plan.

15           67. Under CERCLA Section 107, 42 U.S.C. § 9607, MELP is jointly and severally  
16 liable to the United States for all response costs, including the costs of removal and response  
17 actions, administrative and enforcement costs, and interest thereon, incurred at the Facility.

18                               VII. CLAIM FOR RELIEF AGAINST CMS

19           68. Paragraphs 1 to 50 are realleged and incorporated herein by reference.

20           69. CMS was a "person" within the meaning of CERCLA Sections 101(21) and 107,  
21 42 U.S.C. §§ 9601(21) and 9607.

22           70. CMS was an "owner or operator" of the Tire Pile Facility, at a time in which  
23 hazardous substances were disposed of within the meaning of CERCLA Sections 101(20)(A)  
24 and 107(a)(2), 42 U.S.C. §§ 9601(20)(A) and 9607(a)(2).

25           71. The Tire Pile Facility is a "facility" within the meaning of CERCLA Section  
26 101(9), 42 U.S.C. § 9601(9).

27           72. There have been "releases" and "threatened releases" of "hazardous substances" at  
and from the CMS' facility within the meaning of CERCLA Section 101(14), (22), 42 U.S.C.

1 § 9601(14), (22).

2 73. The costs incurred by the United States in responding to the release and  
3 threatened release of hazardous substances from the Tire Pile Facility are not inconsistent with  
4 the National Contingency Plan.

5 74. Under CERCLA Section 107, 42 U.S.C. § 9607, CMS is jointly and  
6 severally liable to the United States for all response costs, including the costs of removal and  
7 response actions, administrative and enforcement costs, and interest thereon, incurred at the  
8 Facility.

9 **VIII. PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff, the United States, respectfully requests that this Court:

11 a. Enter a judgment that MELP is jointly and severally liable, under the Oil  
12 Pollution Act, 33 U.S.C. §2701 et. seq., for all removal costs incurred by the United States as a  
13 result of the discharge or substantial threat of discharge of oil from Defendants' facilities, as  
14 described herein; or

15 b. Enter a judgment that MELP is jointly and severally liable, under the  
16 Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321, for the actual costs  
17 incurred by the United States in conducting removal of oil or a hazardous substance from  
18 Defendants' facilities; or

19 c. Enter a judgment that MELP is jointly and severally liable, under the  
20 CERCLA, 42 U.S.C. § 9607, for all response and other costs that the United States has incurred  
21 in responding to the release or threatened release of hazardous substances at the Defendants'  
22 facilities;

23 d. Enter a judgment that CMS is jointly and severally liable, under the  
24 CERCLA, 42 U.S.C. § 9607, for all response and other costs that the United States has incurred  
25 in responding to the release or threatened release of hazardous substances at the CMS' facilities;  
26  
27

- 1 e. Award the United States its costs and disbursements in this action; and  
2 f. Grant the United States such other relief as this Court deems just and  
3 proper.

4 Respectfully submitted,

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